

BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS

Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:

T-MOBILE NORTHEAST, L.L.C. AND SPENCERVILLE FREE METHODIST CHURCH,

Petitioners

*

*

Matthew Chaney

*

Kurt Erhard

*

Amrich Garg

*

Lawrence Martinez

*

Camille Shabshab

*

*

For the Petitioner

*

*

Sean Hughes, Esquire

*

Attorney for the Petitioner

*

* * * * *

Mark Bailey

*

Earl Center

*

Joan Coffee

*

Louis Coffee

*

Edwin H. Hollins, Jr.

*

Greg Vilders

*

*

In Opposition to the Petition

*

* * * * *

Before: Françoise M. Carrier, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

	Page No.
I. SUMMARY	3
II. STATEMENT OF THE CASE.....	3
III. BACKGROUND	4
A. The Subject Property and Neighborhood	4
B. Master Plan	12
C. Proposed Use	13
D. Visual and Property Value Impact	23
E. Back-up Power.....	28
F. Need for the Proposed Facility	29
G. Lighting, Signage, Utilities, Traffic and Environment.....	33
H. Community Participation.....	34
IV. SUMMARY OF HEARING	35
A. Applicant's Case in Chief	35
B. Community Opposition	41
V. CONCLUSIONS.....	44
A. Standard for Evaluation.....	44
B. Specific Standards	46
C. General Standards	50
VI. RECOMMENDATION	54

I. SUMMARY

Current Zone and Use:	RE-1 zoning, developed with a church, parsonage/rectory, parking area and picnic shelter.
Proposed Special Exception:	Telecommunication facility consisting of free-standing, 100-foot monopole in a flagpole design, without a flag, to be installed behind church and picnic shelter within a 40-ft by 50-ft. fenced compound.
Need for Monopole:	The Montgomery County Tower Committee has reviewed the proposal and found that petitioner T-Mobile Northeast, LLC has a justified engineering need for the facility as proposed.
Community:	Six immediate neighbors of the site testified in opposition, arguing that the monopole would be an eyesore, and that its visual impact would harm their enjoyment of their property and their property values.
MNCCPC:	The Montgomery County Planning Board and its Technical Staff recommend approval of the petition.
Hearing Examiner:	The Hearing Examiner recommends approval of the petition on grounds that it satisfies the general and specific conditions for the use and would have no inherent or non-inherent adverse effects sufficient to warrant denial.

II. STATEMENT OF THE CASE

Petition S-2709, filed July 10, 2007, requests a special exception under Section 59-G-2.58 of the Montgomery County Zoning Ordinance for a telecommunications facility, to be constructed on property located at 2100 Spencerville Road, Spencerville, Maryland, in the RE-1 Zone, comprised of parcels P195 and P240 on tax map KS22, Tax Account Nos. 05-00259716 and 05-00259738.¹ Petitioner T-Mobile Northeast LLC (“T-Mobile”) has entered into an agreement to lease a portion of the subject property from petitioner Spencerville Free Methodist Church (the “church”), the owner of the property. The church is a joint applicant for the telecommunications special exception.

Technical Staff of the Maryland-National Capital Park & Planning Commission (“M-NCPPC”) reviewed the present petition and, in a report dated March 26, 2008, recommended approval with conditions.² See Ex. 29. Staff submitted supplemental information, responding to a

¹ The Hearing Examiner hereby takes official notice of the Maryland Department of Assessments and Taxation Real Property Database, from which the tax map number was taken.

² The Staff Report has been liberally paraphrased and quoted in Parts I and II of this report.

question from the Hearing Examiner, on April 22, 2008. See Ex. 31. The Montgomery County Planning Board ("Planning Board") considered this petition on April 17, 2008 and voted 3 to 0 to recommend approval based on the findings in the Staff Report. See Ex. 30.

On July 24, 2007 the Board of Appeals scheduled a public hearing in this matter for November 26, 2007, to be conducted by a hearing examiner from the Office of Zoning and Administrative Hearings. The hearing was later postponed at Petitioner's request and, on January 24, 2008, was rescheduled to April 28, 2008. The public hearing was convened after proper notice on April 28, 2008, at which time testimony and other evidence were received in support of and in opposition to the proposed special exception. The record was held open to permit additional submissions by the Petitioners and allow time for public comment, and closed on May 29, 2008. The Hearing Examiner reopened the record on June 19, 2008 to request that T-Mobile submit additional information about the safety of the batteries proposed for back-up power. Following a public comment period, the record closed on July 14, 2008.

III. BACKGROUND

For the reader's convenience, background information is grouped by subject matter.

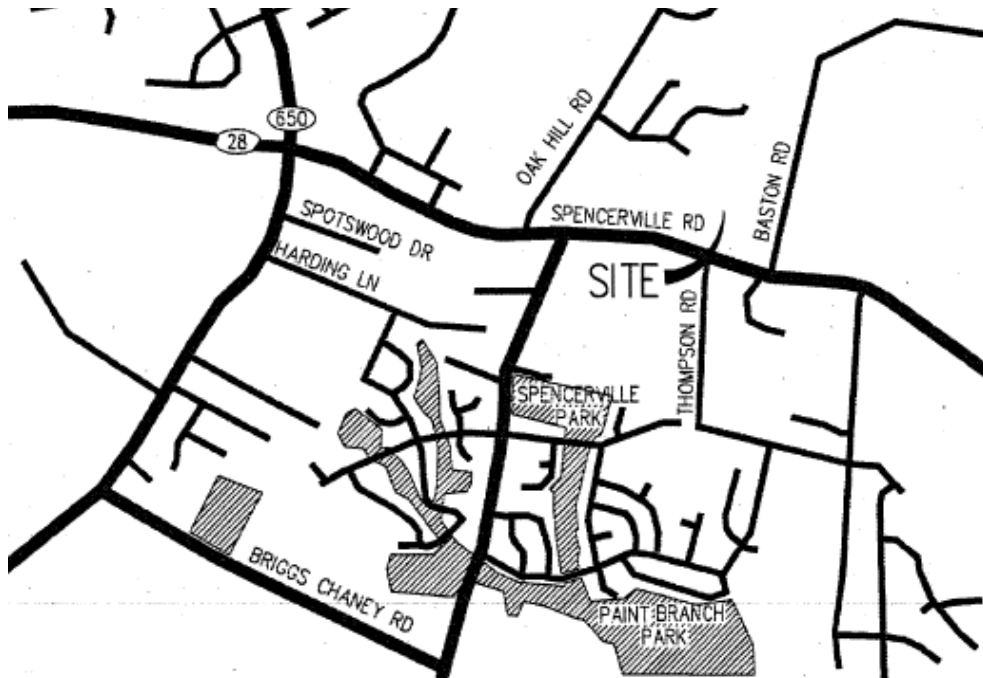
A. The Subject Property and Neighborhood

The subject property consists of approximately 6.2 acres located on the north side³ of Spencerville Road in Spencerville, not far from Batson Road and Good Hope Road. The site consists of two parcels and is generally rectangular in shape and relatively flat, with approximately 440 feet of frontage along Spencerville Road. It is developed with a church, a parsonage/rectory, a parking lot and a picnic shelter. Vegetation consists mostly of grassy areas, with some large trees along the eastern and western property lines.

The subject property borders residential properties in the RE-1 Zone to the east and west. To the north, it borders a 14-acre horse farm in the RC Zone that does not appear to contain a

dwelling. Aerial photography suggests there is no dwelling. The owner of that property, Earl Center, testified that he has a home on a 14-acre site that may be this abutting property, but he also owns several other houses in the immediate area. Technical Staff describes the use of the abutting property to the north as an open pasture for horses. A portion of the subject site's western boundary abuts the site of a landscape contractor special exception (S-2506-A) located partly in the RE-1 Zone and partly in the RC Zone. The general location of the site may be seen on the area map below.

Area Map Excerpted from Site Plan, Ex. 24(c)



The site and its immediate surroundings are shown in the aerial photograph on the next page and in the additional photographs that follow.

³ The text of the Staff Report mistakenly states that the property is on the south side of Spencerville Road, but the maps in the Staff Report and hearing testimony establish that it is on the north side.

Aerial Photograph Downloaded from Google Earth⁴

⁴ The Hearing Examiner hereby takes official notice of the aerial photography available on-line via Google Earth.

View Into Site from Driveway, Ex. 35(a)



Closer View of Picnic Shelter, from Ex. 35(b)



**View from Proposed Equipment Compound Location Towards
Church and Spencerville Road, Ex. 35(c)**



View from Proposed Equipment Compound Location Looking North, Ex. 35(d)



View from Proposed Equipment Compound Location Looking West, Ex. 35(e)



View from Proposed Equipment Compound Location Looking East, Ex. 35(f)

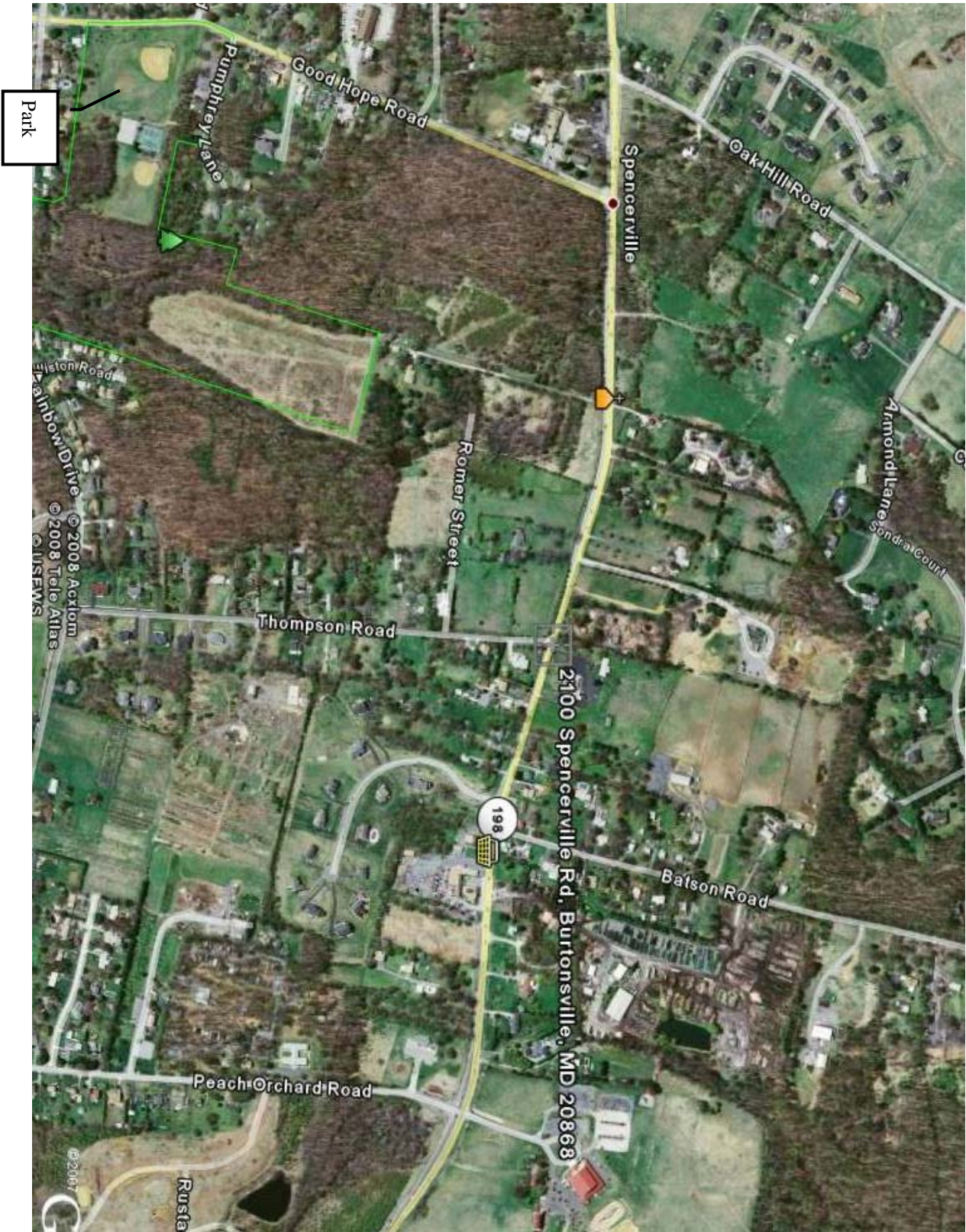


**View from Front of Church Towards Parsonage and Neighboring Home to West,
from Staff Report Attachment 9**



Technical Staff suggests that the relevant neighborhood for this case is bounded by Armond Lane to the northwest, Batson Road to the east and Spencerville Local Park to the south. The Hearing Examiner finds that this area somewhat underestimates the visual impact of a 100-foot tower, particularly in light of the simulation photographs submitted by T-Mobile (and reproduced later in this report). One of those photographs shows that the pole would be visible between the trees from a location on Spencerville Road almost at Good Hope Road. Accordingly, the Hearing Examiner

considers the general neighborhood to be roughly a rectangle formed by lines extending from Armond Lane on the north to Peach Tree Road on the east, Spencerville Local Park on the south and Good Hope Road on the west. This area is shown on the aerial photograph below, from Google Earth.



Aerial Photograph Showing General Neighborhood

The general neighborhood as shown above is classified under the RE-1 (residential, one acre minimum lot size) and RC (Rural Cluster) Zones and contains low-density, single-family detached homes, small farms, a park, the landscape contractor noted above, and two minor special exceptions across Spencerville Road: an accessory apartment and a riding stable. More than half of the general neighborhood, including roughly the southern third of the subject site, is also covered by the Environmental Overlay Zone associated with the Upper Paint Branch Special Protection Area, which imposes restrictions such as impervious area limits.

B. Master Plan

The subject property is within the area covered by the *1997 Approved and Adopted Cloverly Master Plan* (the “Master Plan”), which shows the subject site with single family residential zoning, and affirms its existing RE-1 classification. The plan recommends considering the following factors with regard to special exceptions in the Cloverly area (Master Plan at 37):

- Maintenance of a residential appearance, where feasible.
- Compatibility with the scale and architecture of the adjoining neighborhood, consistent with the proposed use.
- The impact of signs, lighting, and other physical features on surrounding residential communities.
- Location of parking, loading and other service areas to maintain residential appearance to the extent feasible.
- Options for landscaping that minimize the non-residential appearance of the site and the view from surrounding properties and roads. It is preferable for landscaping to reinforce Cloverly’s rural character and be consistent with the streetscape standards . . . of the Master Plan and the landscaping standards for special exceptions.

Technical Staff notes that the applicants have attempted to minimize the visual impact of the proposed tower by using a flagpole design, and that it would be sited about 600 feet from Spencerville Road, 326 feet from the nearest residence to the east and over 380 feet from the residence/tree service/landscape contractor site to the west. Staff concludes that with a flagpole design, the proposed facility would be compatible with surrounding uses and consistent with the recommendations of the Cloverly Master Plan. See Staff Report at 4.

The Hearing Examiner notes that the subject property does not have a residential appearance, but rather the appearance of a church property. The proposed telecommunications facility would be somewhat obscured from view by the picnic pavilion and on-site trees, and would not significantly change the appearance of the site. Compatibility in terms of scale and architecture is not really relevant for a free-standing monopole, since the nature of the structure is to stand taller than anything else around. The proposal does not include lighting, and signage would be very minimal, visible in all likelihood only to someone standing just outside the compound fence. A gravel road would not significantly change the overall appearance of the site, and no new parking area is contemplated.

C. Proposed Use

T-Mobile proposes to construct an unmanned, wireless telecommunications facility disguised as a 100-foot flagpole, but without a flag on top. The antennas necessary to send and receive signals would be concealed inside the flagpole. The flagpole is proposed to be located within a 2,000-square-foot leased area of the site, inside an equipment compound measuring 40 feet by 50 feet. The compound would be enclosed by an eight-foot-high wooden fence, and would also house T-Mobile's equipment cabinets, which are depicted on the site plan detail sheet at a height of 63.5 inches. See Ex. 24(g). The cabinets would be installed on a 10-foot by 20-foot concrete pad. The facility would operate 24 hours a day, but the only visits to the site would be regularly scheduled maintenance visits one or two times per month, plus any emergency repairs that may be necessary. Both the tower and the equipment compound would be able to accommodate two other telecommunications carriers, as required under the Zoning Ordinance. Expert testimony indicated that the radio frequency ("RF") emissions from the proposed facility would be within the standard established by the Federal Communications Commission ("FCC") as safe.

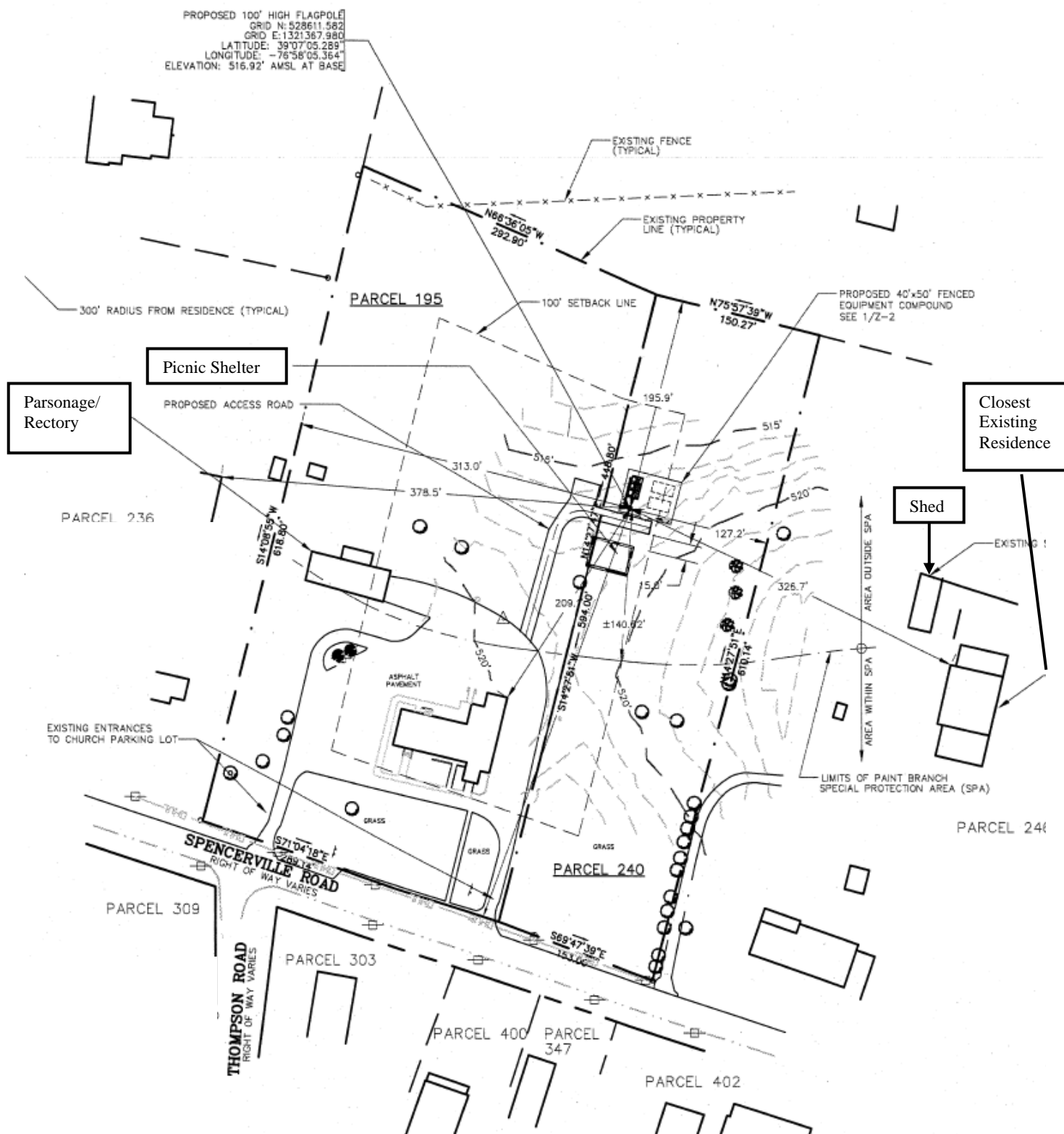
T-Mobile proposes to place the equipment compound and the tower in a grassy area towards the rear of the subject property, about 200 feet from the church and behind the picnic pavilion. The compound would be over 125 feet from the nearest property line and approximately 326

feet from the nearest off-site dwelling. Thus, it would satisfy both the required property line setback (one foot for each foot of height) and the required 300-foot setback from the nearest off-site dwelling. The compound would have vehicular access via a new gravel road, approximately 120 feet long, from the existing parking lot to the compound. Technical Staff found that the proposed facility would be well screened by the picnic pavilion and the tall trees on the east and west property lines. When asked by the Hearing Examiner whether additional landscaping should be required around the fenced compound to soften its appearance, Technical Staff stated that additional landscaping is not necessary in this setting, given the distances to existing residences and the existing trees.











The site plan is shown in full on the next page and in parts, at a larger scale, on the pages that follow.

[This space intentionally left blank]

Site Plan Graphics, from Exhibit 24(c)
















Site Plan Legend, from Exhibit 24(c)

-  FOUND PROPERTY CORNER
-  BENCH MARKS
-  UTILITY POLE
-  GUY ANCHOR
-  SIGN
-  TELEPHONE PEDESTAL
-  INDIVIDUAL TREE – DECIDUOUS
-  INDIVIDUAL TREE – CONIFER
-  BUSH
-  VAULT – HAND HOLE FOR UTILITIES

Line Types from Site Plan, Exhibit 24(c)

LINE TYPES

- BOUNDARY LINE – SUBJECT PARCEL

- UNSURVEYED LINE – BOUNDARY OF ADJOINERS

- TIE LINE FOR DIMENSIONS

- EASEMENT BOUNDARY

- RIGHT OF WAY BOUNDARY

- CENTER LINE

- INTERIOR LOT LINES

- EDGE OF ASPHALT

- EDGE OF GRAVEL

- FENCE LINE – BARBED WIRE

- 1' CONTOUR LINE

- 5' CONTOUR LINE

- OVERHEAD UTILITY LINE


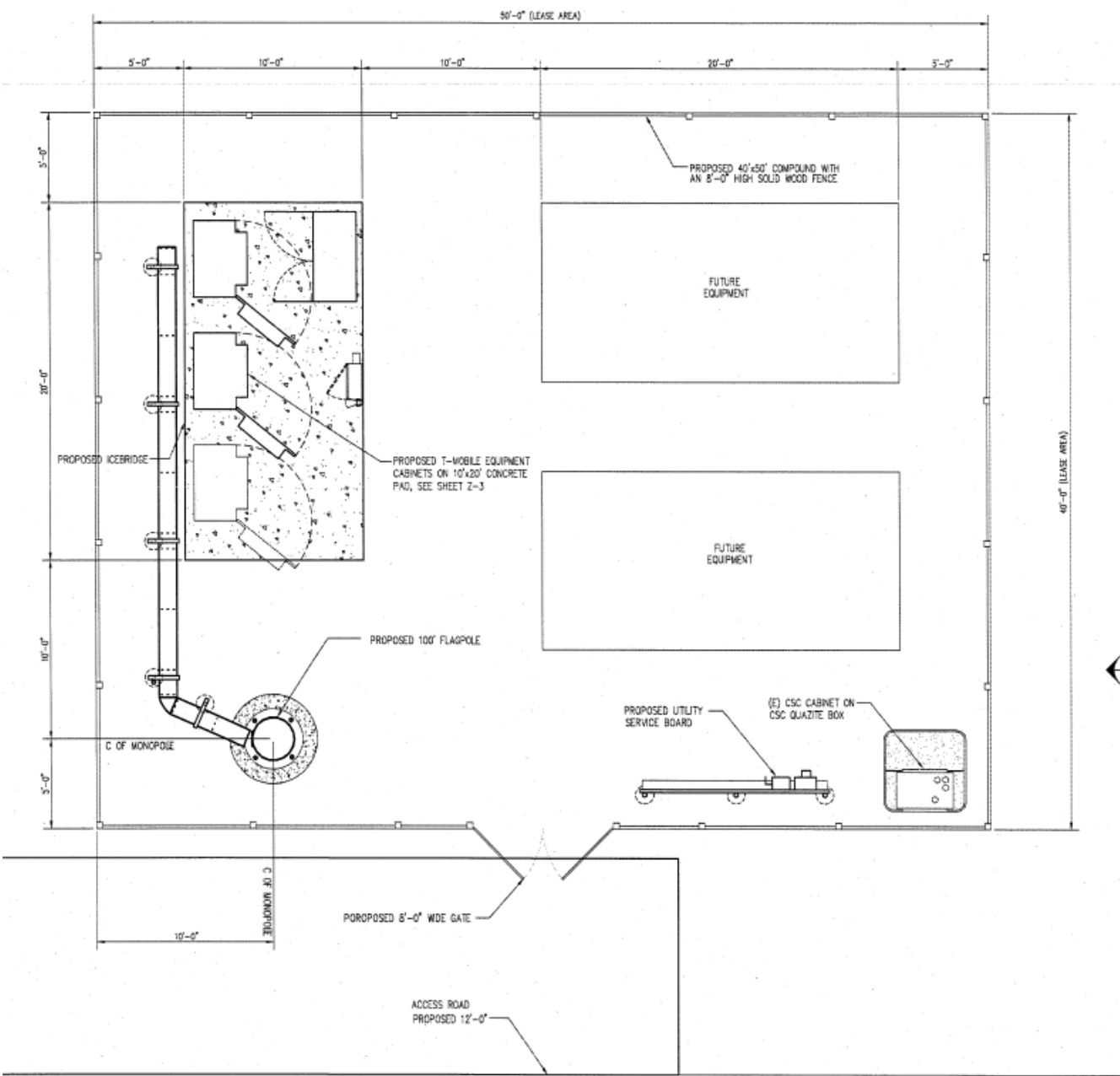
Survey Notes from Site Plan, Exhibit 24(c)

- 1.) SITE NAME: SPENCERVILLE - METHODIST
SITE NUMBER: WAN368A
- 2.) THIS IS NOT A BOUNDARY SURVEY AND IS NOT TO BE USED FOR THE TRANSFER OF PROPERTY.
- 3.) THE SUBJECT PARCELS INFORMATION:
PARCEL 195 OWNER: FREE METHODIST CHURCH
PREMISES ADDRESS: 2100 SPENCERVILLE RD
SPENCERVILLE, MD 20868
MAILING ADDRESS: PO BOX 89
SPENCERVILLE, MD 20868
COUNTY: MONTGOMERY COUNTY
TAX MAP: KS22 PARCEL: P195
DISTRICT NUMBER: 05
ACCOUNT NUMBER: 00259716
USE: EXEMPT, CHURCH

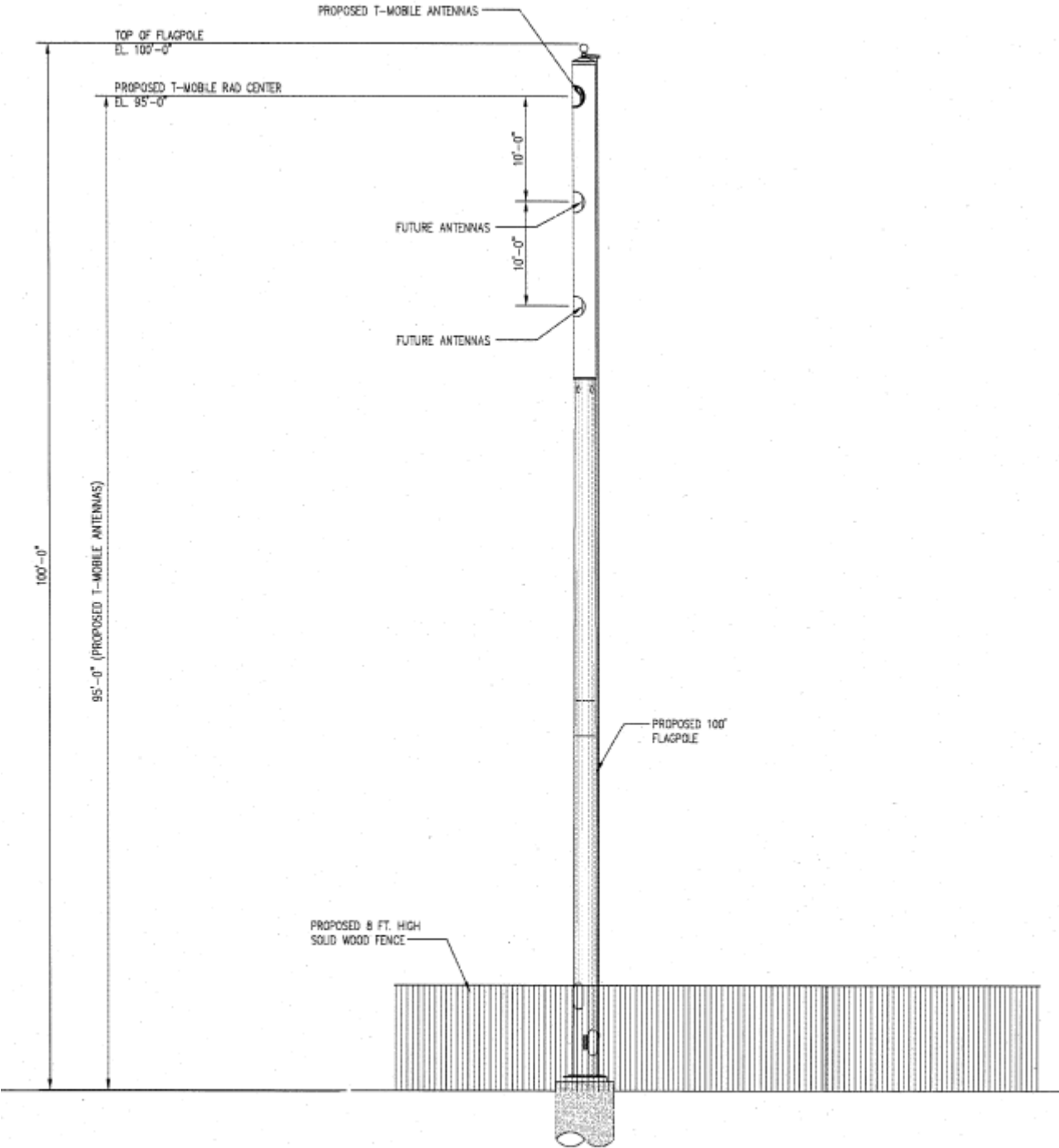
PARCEL 240 OWNER: FREE METHODIST CHURCH
PREMISES ADDRESS: 2100 SPENCERVILLE RD
SPENCERVILLE, MD 20868
MAILING ADDRESS: PO BOX 89
SPENCERVILLE, MD 20868
COUNTY: MONTGOMERY COUNTY
TAX MAP: KS22 PARCEL: P240
DISTRICT NUMBER: 05
ACCOUNT NUMBER: 00259738
USE: EXEMPT, CHURCH
- 4.) THE RECORDED REFERENCES FOR THE SUBJECT PARCELS ARE AS FOLLOWS:
PARCEL 195: DEED BOOK 2504 PAGE 362
AREA: 3.65 AC
PARCEL 240: DEED BOOK 176 PAGE 423
AREA: 2.57 AC
- 5.) THE DATUM'S ARE NAD 83 AND NAVD 88, AND THE BEARING BASE IS STATE GRID.
- 6.) NO UNDERGROUND UTILITIES HAVE BEEN LOCATED, THE PRESENCE OF ANY SUCH UTILITIES MUST BE CONFIRMED BY THE CONTRACTOR BEFORE CONSTRUCTION.
- 7.) NO WETLANDS HAVE BEEN DEFINED AND ANY AREAS SHOWN AS MARSH, PONDS OR DITCHES ARE DONE SO FROM VISIBLE SURFACE FEATURES AND IN NO WAY CONSTITUTE A DEFINED WETLAND.
- 8.) THE FLOOD ZONE OF THE PROPOSED MONOPOLE IS AS FOLLOWS: FLOOD ZONE C, AREA OF MINIMUM FLOODING. SOURCE, FEMA FLOOD MAP FOR MONTGOMERY COUNTY, MD.
COMMUNITY PANEL NUMBER 240049 0200C.
REVISED, AUGUST 5, 1991.
- 9.) A TITLE REPORT WAS FURNISHED FOR THIS SURVEY ON 02-22-2007 AND 08-08-2006 BY US TITLE SOLUTIONS, WITH NUMBERS 20646-MD0701-5031 AND 18119-MD0608-5031.
- 10.) THE DATA COLLECTED AND SHOWN ON THIS DRAWING ARE FOR THE PURPOSES OF CONSTRUCTION OF A CELLULAR MONOPOLE, ANY NECESSARY ANCILLARY EQUIPMENT AND ALL APPROPRIATE EASEMENTS.
- 11.) NO UNRECORDED EASEMENTS ARE SHOWN ON THIS SURVEY AND IT IS POSSIBLE THAT SUCH EASEMENTS IMPACT THE SITE.
- 12.) THIS PROPERTY IS SUBJECT TO ALL MATTERS OF PUBLIC RECORD.
- 13.) THE LOCATION OF THE PROPOSED FLAGPOLE IS AS FOLLOWS; THE VALUES LISTED BELOW ARE WITHIN ±50' HORIZONTAL AND ±20' VERTICAL.
LATITUDE: N 39° 07' 05.289"
LONGITUDE: W 76° 58' 05.364"
ELEVATION: 516.92' AMSL AT BASE
- 14.0 THE PROPOSED TOWER AND EQUIPMENT COMPOUND ARE OUTSIDE THE UPPER PAINT BRANCH SPECIAL PROTECTION AREA.

In addition to the site plan, the Petitioner has submitted detail pages, reproduced in segments below.

Compound Layout, from Ex. 24(e)



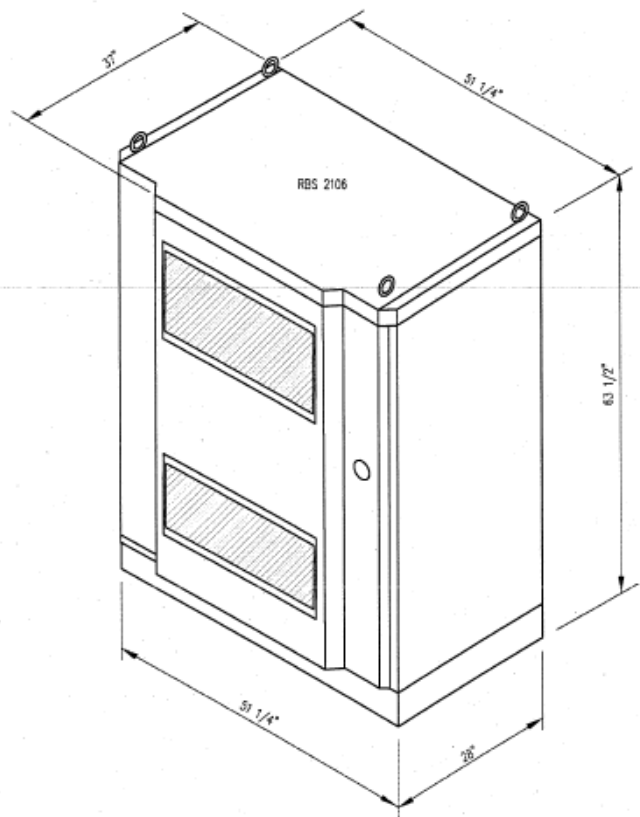
Monopole Elevation, from Ex. 24(e)



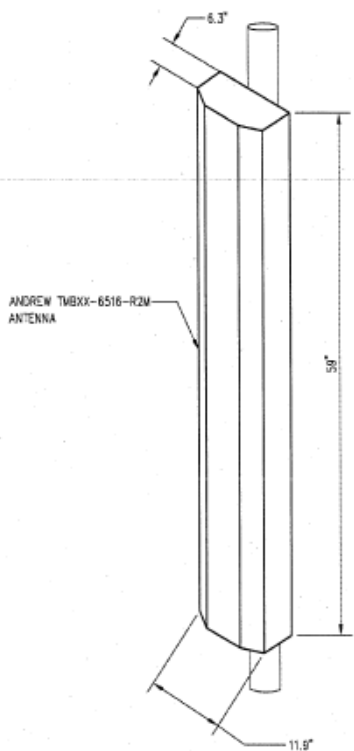
MONOPOLE ELEVATION
SCALE: 1/8"=1'-0"

2
Z-2

Equipment and Antenna Details, from Ex. 24(g)

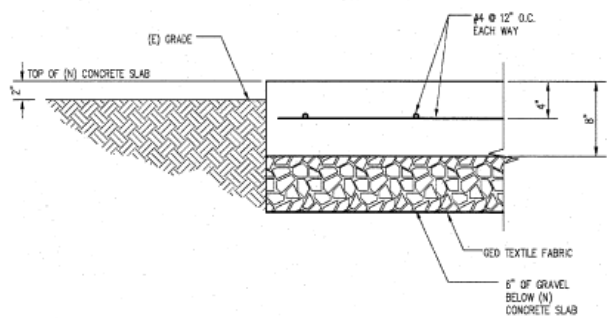


EQUIPMENT DETAIL
SCALE: N.T.S. 1
2-3

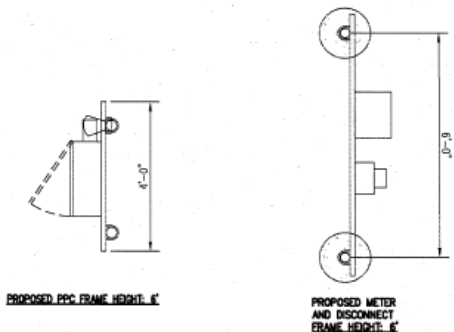


ANTENNA DETAIL
SCALE: N.T.S. 2
2-3

Concrete Pad and other Details, from Ex. 24(g)



CONCRETE PAD DETAIL
SCALE: 1-1/2" = 1'-0" 4
2-3



DETAILS
SCALE: 1/2" = 1'-0" 3
2-3

Aerial Photograph of Site, from Ex. 24(g)



AERIAL PHOTOGRAPH
SCALE: N.T.S.



PMA Map, from Ex.24(i)



PMA MAP
SCALE: 1"=100'



D. Visual and Property Value Impact

The proposed monopole and equipment compound would be visually shielded, to some degree, by tall trees on the subject site, by the picnic pavilion and, from some angles, by the church building and parsonage. The compound would be well-screened from the street and fairly well

screened from the homes to the east and west, both by distance and by the trees and other structures on the site. It would be less well screened from the north, where there are neither tall trees nor intervening structures. However, the sole or at least principal use of the property to the north is as an open field for horses, not as a residence. In light of the flagpole design proposed here, the visual impact would be of a fenced area, very likely not unusual in a semi-rural setting, with a tall pole sticking out. T-Mobile submitted a series of photographs that simulate the appearance of the proposed tower from various vantage points in the area of the site. These photographs were made with an American flag at the top of the pole, but T-Mobile no longer plans to put a flag on the pole. The photographs, reproduced on the pages that follow, suggest that the pole would largely blend in with the tall trees and other structures in the area, such as telephone poles.

Technical Staff concluded that the proposed facility would be compatible with the surrounding area, would not affect the area adversely, and would not alter the predominantly single-family residential character of the area. See Staff Report at 8-9. Staff further concluded that the proposed facility would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood. See *id.* at 8. No specific analysis is provided for this conclusion, but it is generally supported by Staff's other findings. T-Mobile did not present any evidence regarding visual impact or property impact, choosing instead to rely on the Staff Report.

One of the most important questions for the Board to consider is whether the proposed facility would have a visual impact or resulting property value impact sufficiently adverse to warrant denial of the application. This assessment must be made in light of the standard of review specified in the zoning ordinance, which permits denial of a special exception only if the proposed use would have adverse impacts that are non-inherent, i.e., not typical of the use. Because they require height to function, all telecommunication facilities have some visual impact. The question is whether this proposed facility would have greater impact than most because of its features, or features of the site and its surroundings.

Aerial Photo Identifying Locations of Photo Simulations, Ex. 8(a)



Photo P1, Simulation of View Looking Southwest from Batson Road, Ex. 8(b)



Photo P2, Simulation of view Looking Northwest from Phillips Oak Drive, Ex. 8(c)



Photo P3, Simulation of View Looking Northeast from Thompson Road, Ex. 8(d)



Photo P4, Simulation of View Looking East from Spencerville Road, Ex. 8(e)

In the Hearing Examiner's view, the record in this case supports a conclusion that the proposed facility would not have a visual impact or property value impact sufficiently adverse to warrant denial of the application. The facility would be at least partially screened by trees, distance and structures. It would be most visible from the property to the north, where there is no residence, or at least no residence nearby. To ensure that existing screening is maintained to the greatest extent possible, the Hearing Examiner has recommended a condition of approval that would require T-Mobile to obtain authorization to preserve, maintain and replace as necessary, perpetually until the tower is removed from the site, all existing trees that are within 50 feet of the compound or within 75 feet of the northern, western or eastern property lines. This would ensure preservation of the tree screening that is an essential part of the compatibility finding for this monopole. The Hearing Examiner further recommends that the Board of Appeals reserve jurisdiction to require additional landscaping conditions in the future, such as planting tall evergreens along all or part of the northern property line, if justified by future evidence (such as a decision to build a residence within 300 feet of

the subject site's northern property line). This would decrease the likelihood of any significant adverse impact on the value of the property to the north by giving Mr. Center or a future owner a way to request more screening if the use of the property justifies it.

E. Back-up Power

T-Mobile plans to place twelve lead-acid batteries, similar to batteries used in cars, in the locked equipment cabinet within its compound, to serve as a back-up power source in the event of a power outage. See Ex. 44(b). T-Mobile submitted a detailed, seven-page Material Safety Data Sheet from the battery manufacturer, North Star, which describes the amount of sulfuric acid in the batteries. See Ex. 44(b). Sulfuric acid is normally considered a hazardous or extremely hazardous substance, but the Material Safety Data Sheet reports that for transportation purposes, the United States Department of Transportation has issued an "exception as hazardous materials classification" for these batteries. Material Safety Data Sheet at 1 and 6. The Material Safety Data Sheet states that under normal operating conditions the batteries are non-spillable, and therefore not hazardous. Health hazards may arise in the event of case breakage or extreme heat (fire). The Material Safety Data Sheet directs users to store the batteries with adequate ventilation, not to remove vent covers, and not to double-stack batteries. Goggles, vinyl-coated gauntlet-type gloves and safety shoes are recommended when handling batteries, although no respiratory protection is necessary except in the event of acid spillage in a confined space.

T-Mobile also submitted a fact sheet, which was apparently prepared by the manufacturer of the Ericsson equipment cabinets that T-Mobile uses. See Ex. 44(a). This fact sheet states that the United States Environmental Protection Agency classifies the NorthStar batteries used in these cabinets as spill-proof. In addition, the battery case is manufactured to meet the "extreme ruggedness standard" of the International Air Transport Association and is considered puncture-resistant and explosion-proof. The fact sheet states that in the unlikely event of a total battery failure, all electrolyte material (dilute sulfuric acid) would be totally contained inside the sealed equipment cabinet.

Based on this uncontroverted evidence, the Hearing Examiner concludes that the back-up batteries proposed by T-Mobile do not present an unreasonable safety risk.

F. Need for the Proposed Facility

The Montgomery County Code requires that the County's Chief Information Officer (the Director of the Department of Technology Services, or "Director") "establish and maintain a process to coordinate the location of public and private telecommunications facilities in the County." Code § 2-58E (a). The County Executive must issue regulations to implement this process. As part of this process, a designee or contractor selected by the Director (known as the "Tower Coordinator") must review the siting of each proposed facility, advise any land use agency with jurisdiction over the siting of transmission facilities (including the Board of Appeals and the Planning Board) on "the technical rationale at that location for any transmission facility," and make a recommendation as to the proposed location. See Code § 2-58E(c); Executive Regulation 14-96, effective December 10, 1996. The Director must also convene a Transmission Facility Coordinating Group (known as the "Tower Committee") consisting of the Tower Coordinator and representatives of the MNCPPC, the Office of Management and Budget, the cable television administrator in the Department of Technology Services, the Department of Public Works and Transportation, the Department of Permitting Services ("DPS") and any other County, bi-county, or municipal department or agency the Director invites to send a representative. See Code § 2-58E(d)(1). The Tower Commission must review and comment on any pending transmission facility siting issue. See Code § 2-58E(d)(2).

The record in the present case does not include a recommendation from the Tower Coordinator.⁵ The Tower Committee, however, considered T-Mobile's application at a meeting on March 7, 2007 and voted to recommend approval of the proposed facility, at a 100-foot height, conditioned on approval of a special exception by the Board of Appeals. The record does not include

⁵ The specific conditions for the use require submission of a Tower Committee recommendation, but do not mention the Tower Coordinator.

minutes of the Tower Committee meeting that might reference a discussion of need, but a finding of need is implicit in the recommendation of approval.

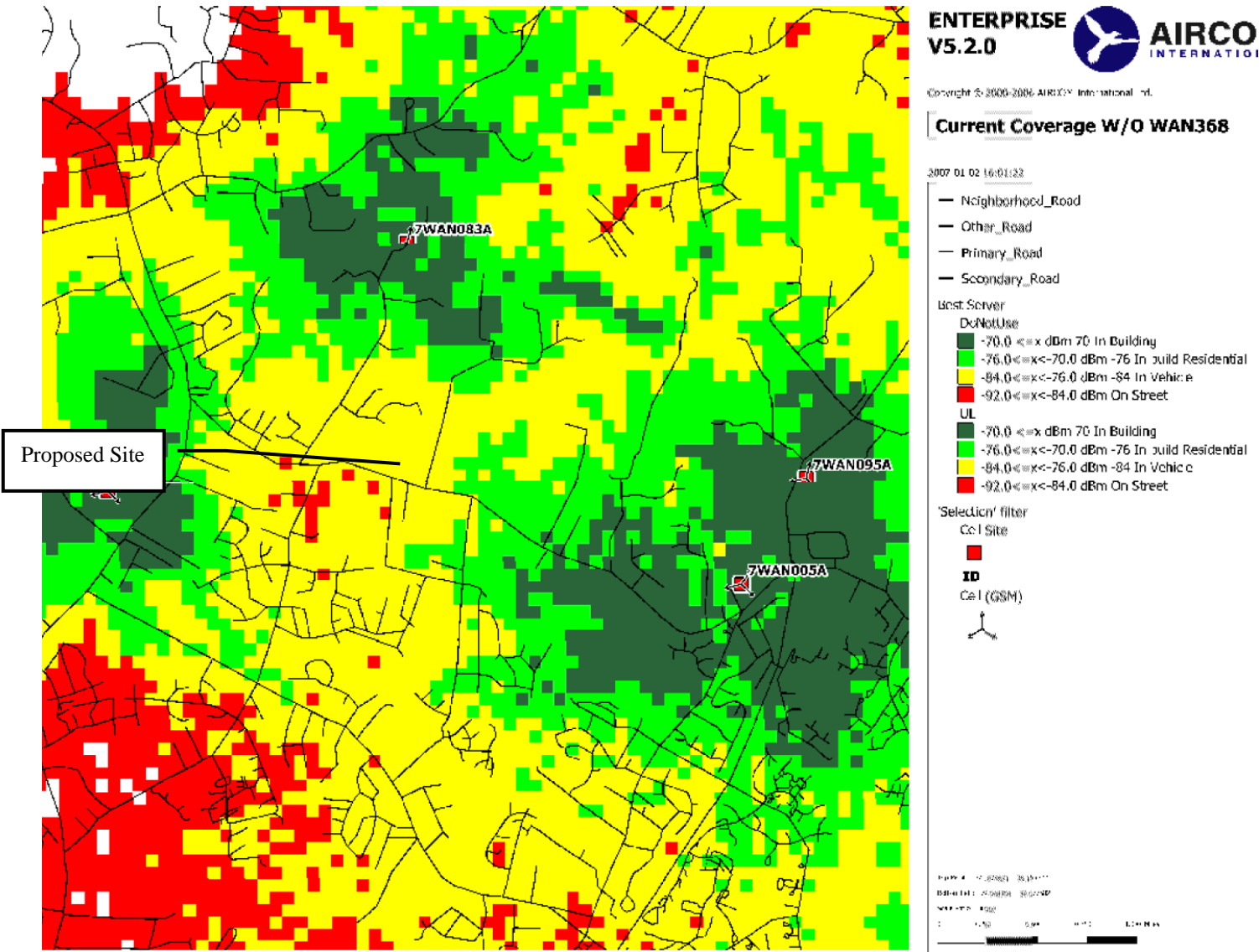
The Zoning Ordinance requires the Planning Board and the Board of Appeals to make separate findings that there is a need for the proposed facility at the proposed location. See Code § 59-G-2.58(a)(12). The Planning Board has recommended approval of this application based on the findings in the Staff Report, which include the observation that the Tower Committee found a justified need for the proposed facility. See Staff Report at 2, 3-4, 13. This is not a specific finding of need, but may be considered an implicit one.

The Board of Appeals has consistently interpreted the “need” requirement in telecommunications facility cases to mean a need to improve coverage to meet a cell phone carrier’s service objectives. The Zoning Ordinance requires a finding of “neighborhood need” for several categories of special exception, including automobile filling stations and community swimming pools. See Code § 59-G-1.24. It requires a finding of “County need” for several others, including drive-in restaurants, funeral parlors and hotels. See Code § 59-G-1.25. “Neighborhood need” is defined to mean that “a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood.” Section 59-G-1.24. “County need” means that “a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood.” Section 59-G-1.25. Neither of these requirements applies to a telecommunications facility special exception. The Hearing Examiner concludes that if the County Council had intended to require a finding of neighborhood need or county need, it would have done so explicitly, as it has for other uses. In the case of telecommunications facilities, it chose not to impose such a requirement.

T-Mobile presented expert testimony and RF coverage maps to demonstrate that it has a need for the proposed facility. The coverage maps, reproduced on the next two pages, show that the proposed facility would improve coverage in an area that currently has on-street and/or in-vehicle

coverage, but no in-building coverage. The new facility would give those areas in-building coverage. See Exs. 10(a) and (b).

T-Mobile Coverage Map without Proposed Facility, Ex. 10(a)



ENTERPRISE V5.2.0

AIRCC INTERNATIONAL

Copyright © 2000-2006 AIRCC International Ltd.

Current Coverage with WAN368@ 100 Ft

Zoomed Out

2007-01-02 15:19:32

- Neighborhood_Road
- Other_Road
- Primary_Road
- Secondary_Road

Best Server

DoNotUse

- 70.0 <= x dBm -70 In Building
- 76.0 <= x <-70.0 dBm -76 In build Residential
- 84.0 <= x <-76.0 dBm -84 In Vehicle
- 92.0 <= x <-84.0 dBm On Street

UL

- 70.0 <= x dBm -70 In Building
- 76.0 <= x <-70.0 dBm -76 In build Residential
- 84.0 <= x <-76.0 dBm -84 In Vehicle
- 92.0 <= x <-84.0 dBm On Street

'Selection' filter

Cell Site

ID

Cell (GSM)

Legend

Top Left: 17.032438 -86.15480

Status Info: 4/10/2007 15:19:32

Scale: 1:100000

Units: Feet

Scale Bar: 0 0.5 1 1.5 Miles

Louis and Joan Coffee, who live next door to the church property to the east, testified that they have very good T-Mobile cell phone service on their property, inside the house and out. This conflicts with T-Mobile's coverage map, which shows that currently, the Coffees should not have in-house coverage. The Coffees contend that this calls into question T-Mobile's evidence that there is a need for the proposed facility. T-Mobile's RF engineer had no explanation for this inconsistency in the coverage map, except to say that anomalies are possible. He remains persuaded by the coverage maps and data from drive tests that T-Mobile needs the proposed facility to enhance weak cell service in the area of the subject site. The Tower Committee reached the same conclusion, although

admittedly, its members did not have the benefit of the Coffees' testimony. T-Mobile witnesses testified, moreover, that T-Mobile would not go to the expense of building a new cell tower unless there were a need for it. The Hearing Examiner concludes that the Coffees' testimony about cell service at their home is not sufficient to overcome the expert testimony of T-Mobile's RF engineer that T-Mobile has a need for the proposed facility to improve its cellular service in the area.

Several community members suggested that T-Mobile should find an alternative site outside their residential neighborhood, for example, near the intersection of Spencerville Road with Route 650. The Hearing Examiner makes no findings on this point because it lies outside the Board's purview and its technical expertise. The Board's responsibility is to assess the potential impacts of the proposed facility on the general neighborhood around it. The application requirements for a special exception to do not provide for submission to the Board of the detailed information that would be necessary to assess whether alternative sites were adequately considered, nor does the Board have access to staff with the technical expertise to evaluate such data. The responsibility to evaluate whether a proposed location is appropriate from a technical standpoint lies with the Tower Committee and the Tower Coordinator, who found that the proposed location is appropriate.

G. Lighting, Signage, Utilities, Traffic and Environment

No lighting is proposed in connection with this facility. Signage would be limited to a two-foot-square warning sign that the FCC requires on the outside of the equipment compound. Electric and telephone utilities are already available on site, and no other utilities would be needed for the proposed facility.

Technical Staff concluded that the proposed facility would not have any adverse impact on the transportation network because it would generate only a very small number of trips to the site, consisting of maintenance visits once or twice a month. See Staff Report Attachment 5. Even if two other companies were to co-locate on the site in the future, their total traffic generation would be only four to six trips per month, except for possible emergency visits.

The subject site contains no forest, streams, wetlands or environmental buffers. Technical Staff reports, however, that roughly the southern one-third of the subject site lies within the Upper Paint Branch Special Protection Area ("SPA") and the associated Environmental Overlay Zone for the SPA. See Staff Report at 6. The northern two-thirds is within the Patuxent River watershed, and the northeast corner of the site is within the Patuxent River Primary Management Area ("PMA"). The locations proposed for the telecommunications facility and access drive are within the Patuxent River Watershed, but outside the PMA. No new impervious surfaces are proposed within the SPA portion of the site. Accordingly, Staff concludes that the proposed special exception would comply with the Environmental Overlay Zone. The project is exempt from the County's forest conversation law because it represents a modification to an existing developed property, and would not clear more than 5,000 square feet of forest. In fact, no trees are proposed for removal.

H. Community Participation

No letters were received from community members. Six nearby neighbors testified in opposition to the proposed facility, including the abutting neighbors to the east and the abutting landowner to the north. All of these witnesses argued that the tower would be an eyesore, would stand out in this semi-rural neighborhood, and would have a detrimental impact on property values. Several questioned why T-Mobile could not fulfill its coverage needs with facilities in non-residential areas. Others argued that because they have excellent T-Mobile service already, despite the fact that T-Mobile's coverage maps suggest they should not be able to use their cell phones inside their home, T-Mobile's contentions about the need for the proposed facility are inaccurate. All testimony is summarized in more detail in Part IV below.

Community member Greg Vilders submitted two articles into the record: "Cell-Phone Towers and Communities: The Struggle for Local Control," by B. Blake Levitt, originally published in the Autumn 1998 issue of *Orion Afield*; and "Communications Tower Sitings: the Telecommunications Act of 1996 and the Battle for Community Control," by Susan Lorde Martin, downloaded from www.law.berkeley.edu/journals. The text of the latter article states that experts "estimate that by

2002, there will be 100,000 towers.” This suggests that the article was written sometime between the passage of the 1996 Act and 2002.

Both articles submitted by Mr. Vilders describe the restrictions that the Telecommunications Act of 1996 (the “1996 Act”) placed on local regulation of the siting of cellular communication facilities. As the members of the Board of Appeals are aware, among other things the 1996 Act prohibits local governments from refusing to allow cell towers within their borders, and prohibits local governments from considering the effects of RF emissions in siting decisions, provided that the RF emissions are below a standard established by the FCC. Both of Mr. Vilders’ articles severely criticize the 1996 Act for removing effective local zoning regulation and forcing local communities to accept towers despite local opposition. The Levitt article describes in some detail the health concerns that some people have about cell phone technology, despite FCC assurances. In the Hearing Examiner’s view, articles such as these would be more productively presented to the members of the County Council, who write the zoning laws applicable to telecommunications facilities and have the power to decide how far Montgomery County will go in controlling these facilities. The role of the Board of Appeals is limited to applying the law as it currently exists. It is certainly true that despite the 1996 Act, local governments can deny permission to erect a cell tower based on aesthetic and property value impacts. Based on the special exception standards established in our Zoning Ordinance, the present case is not one where a denial would be justified.

IV. SUMMARY OF HEARING

A. Applicant’s Case in Chief

1. Lawrence Martinez, church representative. Tr. at 10-13.

Mr. Martinez is chairman of the Board of Trustees for the church. He has been acquainted with the church for about 15 years, a member for five years and chairman of the board for two. Mr. Martinez confirmed that the church is a co-applicant for the telecommunications facility special exception, and supports the application.

In response to questions from a community member about whether neighbors were adequately notified of community meetings about this project, Mr. Martinez stated that T-Mobile handled that notification.

2. Rev. Kurt Erhard, pastor. Tr. at 13-20.

Mr. Erhard testified that when T-Mobile approached the church about setting up a cell tower site, the church felt that the income would give it an endowment to facilitate its ministries, as well as a financial stability beyond the normal support from members and friends. He agreed with the suggestion from T-Mobile's counsel that the tower would benefit members of the community who use cell phones, by providing better cell phone service. Mr. Erhard noted that one of the local citizens associations, the Good Hope Citizen's Association, was very supportive of the project, in part because there is an area south of the church where calls get dropped.

3. Camille Shabshab, civil engineer. Tr. at 24-47.

Mr. Shabshab was designated an expert in civil engineering and telecommunications site design. He helped to design the site plan presented in this case. Mr. Shabshab described the proposed site layout and identified some photographs of the subject site and the surrounding area. He noted that the proposed cell tower would satisfy both the 100-foot setback requirement from the property lines and the 300-foot setback requirement from the nearest off-site dwelling.

In response to questioning from community members, Mr. Shabshab stated that he was not aware that the house next door to the church to the east is a State of Maryland historic site. He described the location chosen for the tower as a combination of what the church wanted, what T-Mobile wanted and where access would be easy. He noted that the facility would be well hidden behind the picnic pavilion, and that putting it farther north on the site, closer to the pastor's house, would bring it closer to the nearest off-site house to the north.

In response to a neighbor's question about paving and stormwater run-off, Mr. Shabshab noted that the road T-Mobile proposes to build would be gravel, so there would not be

much run-off. He described the ground surface in the equipment compound as gravel, except for the 10 ft. x 20 ft. concrete pad.

In response to a question about visual impact from the owner of the closest house due east of the proposed monopole site, Mr. Shabshab stated that the 100-foot tower would be buffered by 60-foot trees, making it hard to see from that property.

Abutting property owner Earl Center raised a concern about the cell tower drawing lightning to the neighborhood during storms, noting that Spencerville is in a high area and he has had lightning strike his fence a couple of times. Mr. Shabshab explained that the cell tower would act as a lightning rod, and would have a grounding system about ten feet into the ground that would channel the electricity from a lightning strike into the ground. He acknowledged that if lightning is going to strike close by, say 100 feet away, it will probably hit the tower. He disclaimed any expertise on lightning, but disagreed with Mr. Center's suggestion that a tall, metal pole will draw lightning to the area. Mr. Shabshab added that he has never seen a cell tower fall down because of lightning.

4. Matt Chaney. T-Mobile representative. Tr. at 47-72.

Mr. Chaney been a consultant to T-Mobile since November 2005, serving as a zoning project manager. In that capacity, he has worked on developing the subject site. Mr. Chaney noted that in accordance with Montgomery County law, the proposed tower and compound would both be sized to accommodate T-Mobile plus two co-locators.

Mr. Chaney reviewed several photographic simulations of how the proposed tower would look at the proposed location. He noted that the photographs show the tower with an American flag flying, but T-Mobile now proposes to erect the tower in a flagpole design, but without a flag.

Mr. Chaney observed that the Tower Committee reviewed the present application and concurred that T-Mobile has a coverage need and that the requested height is appropriate. He noted that based on information he received from the Department of Permitting Services, a property owner is permitted to erect a flagpole up to a height of 199 feet without a building permit.

Turning to public outreach, Mr. Shabshab agreed with counsel's suggestion that the first public outreach in this case was through the Tower Committee meeting. In response to questions from the Hearing Examiner, he testified that the Tower Committee sends out notices of its proceedings on free-standing tower proposals. He was then corrected by T-Mobile's counsel, who acknowledged that the Tower Committee does not mail notice of its proceedings to nearby property owners; one would have to monitor the committee's website to be aware of when particular applications are to be considered. Mr. Chaney noted that T-Mobile met with the Cloverly Master Plan Advisory Committee at the suggestion of Technical Staff, and that organization decided not to take a position on the present application. He described a neighborhood informational meeting in October, 2007, at the church, which T-Mobile publicized by sending invitations to approximately the 50 closest neighbors.

Mr. Chaney testified that the proposed facility would not cause any noise, vibrations, fumes, odors, dust, illumination or glare. He noted that staff would come to the site about once every six weeks for regular maintenance, and could make additional trips to the site in emergencies. He noted that the equipment compound would be enclosed with an eight-foot fence, but he contradicted Mr. Shabshab's statement that it would be topped with barbed wire. Mr. Chaney noted that the facility would have no illumination, and no signs other than the required warning sign. Mr. Chaney agreed, on T-Mobile's behalf, that the tower would be taken down if it is not used by a cell carrier for a period of 12 months or more.

When asked by the Hearing Examiner why the compound is proposed to be 40 feet by 50 feet in size, Mr. Chaney stated that the County requires it to be large enough to fit up to three cellular carriers. He explained that while T-Mobile uses equipment cabinets, three carriers (Nextel, Verizon and Cingular) build actual shelters inside the compound, which have a roof, a floor and four walls, and these can measure 12 by 25 feet.

As to choosing the proposed location, Mr. Chaney stated that T-Mobile found no existing structures on which to co-locate. The only structure of any reasonably suitable height in the

area is the steeple on the church on this site, but there were structural issues associated with using it. He agreed that there are tall structures within a few miles of the subject site, but stated that none of them would provide improved coverage in the target area. Based on his experience in finding 200 to 250 sites in the last two and half years, he identified a number of factors involved, including terrain, elevation and tree cover. In the absence of a suitable co-location site, T-Mobile looked for a large parcel with as much screening as possible and found the subject site, which is of significant size and has wooded buffers on two sides. In addition, it allows T-Mobile to satisfy all of the applicable setback requirements. The actual location on the site, Mr. Chaney explained, was the result of weighing several factors, including aesthetics. T-Mobile decided to use the picnic pavilion to partially screen the facility from the road.

Mr. Chaney reviewed lists of addresses to which invitations to T-Mobile's neighborhood meeting on this project were sent, noting that it included a series of addresses on Batson Road, Spencerville Road, Thompson Road and Phillips Oak Drive. In response to an accusation from a neighbor that the list was not certified by any third party and could have been made up, Mr. Chaney asserted that it was the actual work product used to generate mailing lists. See Tr. at 66-67. Further examination of the list revealed that T-Mobile had failed to include the closest block of homes on Batson, instead sending invitations to homes farther away, so some of the neighbors' complaints about that notice were justified. This is not a legal impediment to approval, however, because a community meeting is not required.

When asked about noise, Mr. Chaney testified that the proposed facility would generate about the same amount of noise as a new refrigerator, although not at a constant, 24-hour level. He further asserted that T-Mobile will comply with county noise rules.

When asked about lightning strikes, Mr. Chaney stated that if a cell tower stops transmitting a signal, it's being monitored by T-Mobile and a technician will be sent out to see what the problem is. T-Mobile's towers are not, to Mr. Chaney's knowledge, connected automatically to the police and fire departments in the event of an emergency. He stated that T-Mobile does not usually

have problems with children climbing their eight-foot fences, even at facilities that are located on school properties. He noted that the fences are of board-on-board construction, so there are no handholds, and added that if someone got inside the compound, they would have to break into the locked equipment cabinets to do any damage. Mr. Chaney stated that the tower itself would not be climbable, in his view. The diameter would be 3.5 feet at the base and about 2.5 feet at the top, and it's a smooth surface.

On rebuttal, Mr. Chaney identified a photograph taken on Spencerville Road, in which telephone poles are visible. He stated that telephone poles can be anywhere from 30 to 60 feet tall, but typically are about 40 feet tall. He agreed that there are telephone poles up and down the length of Spencerville Road.

5. Amrish Garg, radio frequency engineer. Tr. at 72-90.

Mr. Garg has been an RF engineer for 13 years, seven of them for T-Mobile, and estimates that he has worked on approximately 3,000 cell phone sites. He was designated an expert in RF engineering. Mr. Garg referred to coverage maps to explain why T-Mobile needs the proposed facility to provide enhanced cell phone service. He identified areas on Spencerville Road and other nearby roads where T-Mobile's coverage does not allow people to make calls from their homes. He testified that the proposed facility would enhance coverage in those areas, so that customers can use their cell phones in their homes. Mr. Garg identified a number of existing T-Mobile sites within one to two miles of the subject property, most of which are mounted on existing structures. See Tr. at 77-80.

Mr. Garg testified that U.S. residents make approximately 290,000 calls to 911 each day from their cell phones, which is greater than the number of such calls made from homes. He noted that in the area of the subject site, approximately 17,000 calls were made to 911 from cell phones during the one-year period from February 2007 to February 2008. He opined that the proposed facility would enhance both non-emergency and emergency cell phone service in the area, noting that if someone in this area tried to call 911 from a cell phone inside a house, chances are the call would not go through. He acknowledged that other carriers might be able to provide coverage.

Mr. Garg stated that the antennas on the proposed structure would not be visible, as they would be entirely inside the pole. He also observed that the RF emissions from the site would be within FCC guidelines.

When asked by the Hearing Examiner what would be inside the equipment cabinets, Mr. Garg stated that they would contain equipment that takes electricity and generates RF signals, as well as three batteries for back-up power. He was unable to describe the batteries.

B. Community Opposition

1. Earl Center. Tr. 20-24; 101-103.

Mr. Center testified that a few years ago he applied to put up a 100-foot radio tower on his property adjacent to the subject site, and permission was not granted. He wants to know why the church can get approval for a cell tower if he couldn't get approval for a radio tower. The Hearing Examiner was unable to provide a substantive reply, lacking any specific information about why Mr. Center's application was turned down. The Staff Report, however, states that a special exception was requested on Mr. Center's property in 1987, to permit a 340-foot-tall radio tower. See Staff Report at 3. The Planning Board recommended denial of the application and the Board of Appeals denied it, on grounds that it did not satisfy either the specific standards for the special exception or the general conditions under Code § 59-G-1.21. See *id.*

Mr. Center opposes the proposed facility due to the impact he expects on his property. He bought his property adjacent to the church in 1962, intending to retire on it, although now he doesn't know whether that will ever happen. He thinks the visual impact of the tower would be bad, and did not hear any testimony about T-Mobile's efforts to find other locations outside of a residential neighborhood. Mr. Center described himself as a God-fearing man, and thinks that the church should not have even considered something like this that would harm the neighborhood. He noted that there is nothing between his property and the church except a hedgerow, so there is nothing to block the view of the tower.

2. Greg Vilders. Tr. at 90-94.

Mr. Vilders presented two articles about community control and communication tower siting, addressing property value and health concerns. Mr. Vilders provided corrections for the labeling on one of T-Mobile's photographs, which did not correctly identify where it was taken.

Mr. Vilders objects to the proposed facility. He argued that the only stealth involved is the way T-Mobile has tried to get this approved without community involvement. He contended that T-Mobile made no real effort to inform the community, noting that when the church has special activities for kids they put fliers in people's mailboxes, which is easy to do because the nearby homes are so close. In Mr. Vilders' view, any benefits of better cell services are outweighed by the damage the facility will do to property values, and possibly to residents' health. He considers it ridiculous to say that a 12-foot-high picnic pavilion would screen the view of a 100-foot tower. He suggests that if a new cell tower is needed, T-Mobile should put it at the intersection of Rte. 650 and Rte. 198, where there would be no harm to residential property values. He maintains that a cell tower does not belong in the middle of horse country, next door to a field that is home to 50 race horses (Mr. Center's property). He believes the proposed tower will stick out like a sore thumb in this area, where the tallest structure is a 30-foot barn.

3. Edwin A. Hollins, Jr. Tr. at 94-96.

Mr. Hollins lives on Spencerville Road across from the subject site. He opposes the present applicant on grounds that the facility would be an eyesore at this location, and could probably be located someplace else where it would not be an eyesore.

4. Joan Coffee. Tr. at 96-98.

Ms. Coffee lives next door to the church, to the east. She opposes the proposed facility, arguing that the church would be making money at the neighbors' expense. She contended that the tower would affect her enjoyment of her property, including the view she enjoys of Mr. Center's horse farm behind her house. She does not want her view of Mr. Center's fields and horses to be obstructed. Ms. Coffee believes the tower would be out of place among the homes and the

horse farm. She also argued that Spencerville Road is very congested, and that the truck traffic during construction would make it worse.

Ms. Coffee stated that she and her husband purchased their home 30 years ago because it was in a nice, quiet, somewhat rural area, and it has remained pretty much that way. Moreover, their house is a State of Maryland historic landmark, so it seems inconsistent to have a cell tower right next door. She questioned whether T-Mobile wants to build the proposed facility more for other carriers to located on it than for T-Mobile, since she and her husband have very good T-Mobile service at their house. She is also concerned about inadequate notice of the proposal.

5. Louis Coffee. Tr. at 98-100.

Mr. Coffee opposes the present petition on grounds that it would devalue his property, detracting from the beauty of its setting. He noted that this home was built in 1859, and is a three-story, log farm house, which is rare in Montgomery County. In his view, people will be able to see the proposed tower from everywhere, and it will make the area look horrible. He is also concerned about health impacts, stating that cell towers have not been around long enough for anyone to know what their long-term impact is.

Mr. Coffee questioned why T-Mobile has proposed this project, since he and his wife have good T-Mobile service already. He declared that the church is proposing this strictly to make money, not to help the community. He also questioned the notice given to community members, noting that the two community organizations T-Mobile contacted do not cover the area right around the subject site, and that T-Mobile made very little effort to actually reach the neighbors.

Mr. Coffee also raised several issues in his questions to T-Mobile witnesses. He argued that the proposed facility would add to the noise level from Route 198, in an area of open fields where sound travels. He raised a concern that if lightning hits the tower, someone will have to call the police and fire department. Mr. Coffee fears that children will be able to climb over the fence and climb up the tower, despite its large diameter and smooth surface.

6. Mark Bailey. Tr. at 100- 101.

Mr. Bailey opposes the proposed facility on grounds that it would create a commercial atmosphere that would not fit into the neighborhood. He suspects that there will be more traffic than T-Mobile suggests, with workers there every other week.

V. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. The special exception is also evaluated in a site-specific context, because there may be locations where it is not appropriate. Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (see Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed special exception would satisfy some, but not all of the specific and general requirements for the use.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a telecommunication facility.

Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Physical and operational characteristics associated with a telecommunications facility include antennas installed on or within a support structure with a significant height; an equipment platform and equipment cabinets that may or may not be enclosed within a fence; visual impacts associated with the height of the support structure; RF emissions; a very small number of vehicular trips per month for maintenance; and some form of back-up power. In the present case, Technical Staff concluded that the proposed facility would have no non-inherent adverse effects. See Staff Report at 14. Staff noted that the facility would comply with FCC regulations related to RF emissions and its only impact would be visual, because it would be noiseless and unstaffed, requiring only occasional servicing. Staff found no unusual site characteristics.

The Hearing Examiner considers the proposed support structure and the presence of a fenced equipment compound to be inherent characteristics of the use; all telecommunication facilities must be attached to a support structure, and the monopole proposed here is below the 155-foot height that the Zoning Ordinance suggests is generally acceptable. Moreover, all telecommunications facilities have equipment cabinets, and based on the Hearing Examiner's experience in other cases, free-standing monopole sites typically house the cabinets in a fenced enclosure. Likewise, the anticipated level of vehicular trips and staffing is inherent in the use. The location of the proposed facility on the site is typical for such facilities, which generally are located to take advantage of existing screening opportunities from structures and trees. Similarly, the proposed back-up battery installation appears to be typical, and based on the uncontradicted information submitted by T-Mobile, would not

present any serious safety hazards. The Hearing Examiner has not identified any unusual site characteristics. Thus, the Hearing Examiner concludes that the proposed facility includes no non-inherent features.

B. Specific Standards

The specific standards for a telecommunications facility are found in § 59-G-2.58. As outlined below, the evidence of record demonstrates compliance with the specific standards.

Sec. 59-G-2.58. Telecommunications facility.

(a) Any telecommunications facility must satisfy the following standards:

- (1) A support structure must be set back from the property line as follows:
 - a. In agricultural and residential zones, a distance of one foot from the property line for every foot of height of the support structure.
 - b. In commercial and industrial zones
 - c. The setback from a property line is measured from the base of the support structure to the perimeter property line.
 - d. The Board of Appeals may reduce the setback requirement to not less than the building setback of the applicable zone if the applicant requests a reduction and evidence indicates that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.

Conclusion: The subject site is in a residential zone, so the applicable property line setback is equal to the proposed height of the support structure (the cell tower, or in this case, the flagpole, which is 100 feet). The location proposed for the tower in this case satisfies this setback requirement on all sides. The tower would be approximately 313 feet from the western property line, 127 feet from the eastern property line, 196 feet from the rear property line and 600 feet from the front property line.

- (2) A support structure must be set back from any off-site dwelling as follows:

- a. In agricultural and residential zones, a distance of 300 feet.
- b. In all other zones, one foot for every foot in height.
- c. The setback is measured from the base of the support structure to the base of the nearest off-site dwelling.
- d. The Board of Appeals may reduce the setback requirement in the agricultural and residential zones to a distance of one foot from an off-site residential building for every foot of height of the support structure if the applicant requests a reduction and evidence indicates that a support structure can be located in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, and visibility from the street.

Conclusion: The subject site is in a residential zone, so the 300-foot setback applies.

As shown on the submitted site plan, the proposed facility would satisfy this requirement. It would be approximately 326 feet from the nearest off-site dwelling.

- (3) The support structure and antenna must not exceed 155 feet in height, unless it can be demonstrated that additional height up to 199 feet is needed for service, collocation, or public safety communication purposes. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection pursuant to the building permit, the applicant must certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure as authorized in the building permit.

Conclusion: Petitioners request a support structure height lower than 155 feet.

- (4) The support structure must be sited to minimize its visual impact. The Board may require the support structure to be less visually obtrusive by use of screening, coloring, stealth design, or other visual mitigation options, after considering the height of the structure, topography, existing vegetation and environmental features, and adjoining and nearby residential properties. The support structure and any related equipment buildings or cabinets must be surrounded by landscaping or other screening options that provide a screen of at least 6 feet in height.

Conclusion: T-Mobile has agreed to make the proposed structure less visually obtrusive by disguising it as a flag pole. T-Mobile has also agreed to enclose the equipment compound within an eight-foot, wooden fence. The Hearing Examiner agrees with Technical Staff

that additional landscaping is not necessary under current conditions, but recommends that the Board reserve jurisdiction to require additional landscaping if future conditions, such as an intent to construct a residence closer to the site's northern property line, so warrants.

This paragraph also requires the support structure to be "sited to minimize its visual impact." The evidence indicates that T-Mobile has done so, identifying a location on the site that takes advantage of available screening from existing structures and trees.

- (5) The property owner must be an applicant for the special exception for each support structure. A modification of a telecommunications facility special exception is not required for a change to any use within the special exception area not directly related to the special exception grant. A support structure must be constructed to hold no less than 3 telecommunications carriers. The Board may approve a support structure holding less than 3 telecommunications carriers if: 1) requested by the applicant and a determination is made that collocation at the site is not essential to the public interest; and 2) the Board decides that construction of a lower support structure with fewer telecommunications carriers will promote community compatibility. The equipment compound must have sufficient area to accommodate equipment sheds or cabinets associated with the telecommunication facility for all the carriers.

Conclusion: The property owner is an applicant for the telecommunications facility special exception. Undisputed evidence demonstrates that both the support structure and the equipment compound can accommodate no less than three telecommunications carriers.

- (6) No signs or illumination are permitted on the antennas or support structure unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.

Conclusion: No signs or illumination are proposed on the antennas or the support structure.

- (7) Every freestanding support structure must be removed at the cost of the owner of the telecommunications facility when the telecommunications facility is no longer in use by any telecommunications carrier for more than 12 months.

Conclusion: T-Mobile has committed to remove the support structure when it is no longer in use by any telecommunications carrier for more than 12 months.

- (8) All support structures must be identified by a sign no larger than 2 square feet affixed to the support structure or any equipment building. The sign must identify the owner and the maintenance service provider of the support structure or any attached antenna and provide the telephone number of a person to contact regarding the structure. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.

Conclusion: T-Mobile has agreed to comply with this requirement.

- (9) Outdoor storage of equipment or other items is prohibited.

Conclusion: No storage of equipment or other items outside the equipment compound is proposed.

- (10) Each owner of the telecommunications facility is responsible for maintaining the telecommunications facility, in a safe condition.

Conclusion: No finding necessary.

- (11) The applicants for the special exception must file with the Board of Appeals a recommendation from the Transmission Facility Coordinating Group regarding the telecommunications facility. The recommendation must be no more than one year old.

Conclusion: T-Mobile filed with the Board a recommendation from the Transmission Facility Coordinating Group that was issued in March 2007, less than one year before the application was filed.

- (12) Prior to the Board granting any special exception for a telecommunications facility, the proposed facility must be reviewed by the County Transmission Facility Coordinating Group. The Board and Planning Board must make a separate, independent finding as to need and location of the facility.

Conclusion: The present application was reviewed by the Transmission Facility Coordinating Group, as discussed in Part III.F. The Planning Board, adopting the reasoning in the Staff Report, recommended approval at the proposed location. As discussed in Part III.F., the Hearing Examiner is persuaded that T-Mobile has demonstrated a need for the proposed facility to provide enhanced cell phone service to its customers. As discussed above in connection with Section 59-G-2.58(a)(4), the Hearing Examiner finds that the location proposed for the facility appropriately

minimizes the visual impact of the facility. Accordingly, the Hearing Examiner finds that the proposed location is appropriate.

- (b) Any telecommunications facility special exception application for which a public hearing was held before November 18, 2002 must be decided based on the standards in effect when the application was filed.

Conclusion: Not applicable.

- (c) Any telecommunications facility constructed as of November 18, 2002 may continue as a conforming use.

Conclusion: Not applicable.

C. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and Petitioner's written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions:

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

- (1) Is a permissible special exception in the zone.

Conclusion: A telecommunications facility is a permitted use in the RE-1 Zone.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use would comply with the standards and requirements set forth for the use in Code §59-G-2.58, as detailed in Part V.B. above.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any

recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The evidence supports Technical Staff's conclusion that the proposed use would be generally consistent with the recommendations of the *1997 Approved and Adopted Cloverly Master Plan*, as discussed in Part III.B.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.

Conclusion: As discussed in Part III.D regarding visual impact, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed facility would be sufficiently harmonious with the general character of the neighborhood to support approval at the location currently proposed. Unrefuted evidence demonstrates that public services and facilities would be adequate to serve the proposed development.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that, for the reasons stated in Part III.D., the proposed use would not be detrimental to the use, peaceful enjoyment and economic value of surrounding properties or the general neighborhood.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that the proposed special exception would cause no objectionable noise, vibrations, fumes, odors, dust or physical activity at the subject site.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: Three existing special exceptions have been identified in the general neighborhood: a landscape contractor adjacent to the west and two minor uses, an accessory apartment and a stable, across Spencerville Road. The Hearing Examiner agrees with Technical Staff that in light of the low levels of activity and traffic associated with the proposed telecommunications facility, the proposed special exception would not increase the intensity or scope of special exception uses sufficiently to affect the area adversely or alter its primarily residential nature.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports a conclusion that the proposed special exception would not adversely affect the health and safety of residents in the area of the subject site. As noted during the hearing, federal law prohibits local governments from considering the effects of RF emissions in deciding whether to permit telecommunication facilities, as long as the emissions are below a standard established by the FCC. Unrefuted expert testimony in this case establishes that the facility's RF emissions would be below the FCC standard.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

Conclusion: The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities with the proposed use and would have no adverse effect on public facilities.

(A) If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.

(B) If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.

Conclusion: Subdivision approval would not be required. The Hearing Examiner accepts Technical Staff's conclusion that the very small number of vehicle trips the proposed use would generate can be accommodated by the local roadway network. No other traffic test applies under the Growth Policy in effect when this application was filed, in July 2007.

(C) With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.

Conclusion: The evidence strongly supports a conclusion that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic on the public roads, as it would contribute only a minimal number of vehicles to area roadways.

(b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.

Conclusion: No finding necessary.

(c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Conclusion: For the reasons stated above, the Hearing Examiner concludes that Petitioners have met their burdens of production and persuasion.

59-G-1.23 General Development Standards

Pursuant to Section 59-G-1.23, each special exception must comply with the development standards of the applicable zone where the special exception is located, unless the specific conditions for the use specify development standards, which is the case for telecommunications facility special exceptions. Section 59-G-1.23 also requires compliance with applicable parking requirements under Article 59-E, forest conservation requirements under Chapter 22A, and sign regulations under Article 59-F, and states that a special exception must incorporate glare and spill light control devices to minimize glare and light trespass and, in a residential zone, may not have lighting levels along the side and rear lot lines exceeding 0.1 foot candles.

Ample parking would be available in the church's parking lot for the modest needs of this use. No forest conservation requirement applies because no forest would be disturbed. The single sign proposed is required under the specific conditions for the use. No lighting is proposed.

VI. RECOMMENDATION

Based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2708, which requests a special exception under the RE-1 Zone for a telecommunications facility to be constructed on property located at 2100 Spencerville Road, Spencerville, Maryland, be **granted** subject to the following conditions:

1. Petitioners shall be bound by all of the testimony of their witnesses and exhibits of record, including the Site Plan and detail sheets, Exhibits 24(c), (e) and (g), and by the representations of counsel identified in this report.
2. T-Mobile must enter into an agreement with the Spencerville Free Methodist Church and its successors and assigns that will permit it to preserve, maintain and replace as necessary, perpetually until the proposed tower is removed from the site, all existing trees that are within 50 feet of the equipment compound or within 75 feet of the northern, eastern or western property lines.

3. The subject facility must not have any exterior lighting or signage, with the exception of the warning sign required under Section 59-G-2.58(a)(8).
4. The Board of Appeals reserves jurisdiction to impose additional conditions in the future related to landscaping if justified by future evidence, such as evidence of an actual, good faith, immediate intent to build a residence within 300 feet of the subject property's northern property line.
5. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits or a use-and-occupancy permit, necessary to implement the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and facility comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: July 24, 2008

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner